In the Supreme Court of the United States

OCTOBER TERM, 1967

AUSTRAL OIL COMPANY INCORPORATED, ESCONDIDO CANYON GAS COMPANY, ET AL., BELRIDGE OIL COMPANY, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL POWER COMMISSION

ERWIN N. GRISWOLD,
Solicitor General,
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Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1967

Nos. 504, 520, 526

AUSTRAL OIL COMPANY INCORPORATED, BROOKLYN UNION GAS COMPANY, ET AL., BLANCO OIL COMPANY, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL POWER COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (Austral Pet. App. A, pp. 1a–41a; Brooklyn Pet. App. pp. 1a–41a) is reported at 378 F. 2d 510. The opinion and order of the Federal Power Commission (J.A. 436–463)[1]

[1] "J.A." refers to the joint appendix filed in C.A. 5, Nos. 23188, 23189, 23325, 23333, 23408, 23454 and 23455, all of which related to the Commission's order in *Turnbull & Zoch Drilling Co.*, 34 F.P.C. 1001. The petitions for review in these cases were consolidated by the court of appeals with petitions to review a second Commission order entered in a separate, but similar, in-line price proceeding, *Hassie Hunt Trust*, 30 F.P.C. 1438. A separate joint appendix was filed in the proceedings relating to the *Hunt* order. The instant petitions for certiorari relate exclusively to the Commission's order in *Turnbull & Zoch*.

is reported at 34 F.P.C. 1001, and its order denying rehearing (J.A. 483–488) is reported at 34 F.P.C. 1367.

JURISDICTION

The judgment of the court of appeals (Brooklyn Pet. App. 42a) was entered on May 24, 1967. The petitions for writs of certiorari were filed on August 16, 1967 (No. 504), August 21, 1967 (No. 520), and August 22, 1967 (No. 526). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

STATEMENT

The Commission granted certificates of public convenience and necessity authorizing sales of gas by numerous independent producers in Texas Railroad Commission District No. 4. The certificates were conditioned to require the producers to charge no more than a specified ("in-line") price.[2] The Commission deferred for later consideration the question whether and to what extent refunds should be required of those producers who had charged more than the in-line price pursuant to unconditioned temporary certificates.

The court of appeals affirmed the Commission's in-line price determinations, rejecting, *inter alia*, the

[2] The Commission made three separate in-line price determinations in this proceeding: (1) 15 cents per Mcf for sales antedating the issuance of the Commission's Statement of General Policy No. 61–1, 24 F.P.C. 818 (September 28, 1960), (2) 16 cents per Mcf for sales contracted subsequent thereto but prior to the amendment of the original guideline price established by the Policy Statement, and (3) 16 cents per Mcf for sales postdating the amendment.

argument of the consumer-distributor parties (petitioners in No. 520) that in fixing the 16-cent post-Policy Statement prices the Commission had erroneously relied upon contract prices, temporary certificate prices, and its Policy Statement "guideline" prices. In this respect, the court expressly followed the decision of the Tenth Circuit in *Sunray DX Oil Co.* v. *Federal Power Commission*, 370 F. 2d 181, pending on petitions for certiorari in Nos. 60, 61, 62, and 82, this Term, which also approved a 16-cent in-line determination for post-Policy Statement sales from Texas District No. 4. Conversely, it recognized that its reasoning was contrary to that of the District of Columbia Circuit in *Public Service Commission of New York* v. *Federal Power Commission*, 373 F. 2d 816, pending on petitions for certiorari in Nos. 111, 143, 144 and 231, this Term.

With respect to refunds, the court held that the question whether the Commission had the power to require refunds was ripe for review and that the Commission does have the power to require refunds under unconditioned temporaries. It expressed its disagreement with the Tenth Circuit's holding in *Sunray DX*, *supra*, and related cases [3] that the Commission lacked such refund power.

Finally, the Court rejected the consumer-distributors' contention that the certificate applications

[3] *Pan American Petroleum Corp.* v. *Federal Power Commission*, 376 F. 2d 161, pending on petitions for certiorari in Nos. 227, 415 and 516, this Term; *Standard Oil Co.* v. *Federal Power Commission*, 376 F. 2d 578, pending on petitions for certiorari in Nos. 80, 97, and 503, this Term.

should have been denied for lack of an adequate showing of public need for the gas involved. In so ruling, the Court stated its disagreement with the District of Columbia Circuit's decision in *Public Service Commission of New York* v. *Federal Power Commission, supra.*

DISCUSSION

The questions presented here are the same as those presented in a number of other pending petitions.[4] We have already expressed our view that the in-line and refund questions warrant review. See our petitions in Nos. 60, 80, 144 and 227. However, for the same reasons noted in our petition in No. 144 and in our memorandum in No. 231, this Court may wish to defer action on the present petitions (as well as on those challenging the *Public Service Commission* decision of the District of Columbia Circuit and the *Pan American* decision of the Tenth Circuit) until final dis-

[4] The refund question presented in Nos. 504 and 526 is the same question raised by our petitions in Nos. 60 (*Sunray DX*), 80 (*Standard Oil*), and 227 (*Pan American*), and by the petitions of other parties in Nos. 61 and 62 (*Sunray DX*), 97 and 503 (*Standard Oil*), and 415 (*Pan American*), all of which relate to the Tenth Circuit's recent decisions holding that the Commission lacks such power.

The in-line price question presented by the petition in No. 520 has previously been raised by the consumer-distributors' petitions in Nos. 61 and 62, this Term, which seek review of the Tenth Circuit's decision in the *Sunray DX* case, *supra*, and by our petition in No. 144 and the producer petitions in Nos. 111, 143 and 231, this Term, which seek review of the District of Columbia Circuit's decision in *Public Service Commission*, *supra.*

The public need question presented by No. 520 is also presented by Nos. 143 and 231.

position of Nos. 60–62, 80, 97 and 503, which relate to the Tenth Circuit's *Sunray* and *Standard Oil* decisions and which fully present the refund and in-line questions.

To be sure, the question of public need raised by petitioners in No. 520 is not involved in those cases. But, as urged in our memorandum in No. 231, review of that issue is not warranted since no real conflict exists between the decision below and the decision in the *Public Service Commission case, supra,* where the District of Columbia Circuit held that the Commission had not adequately considered the issue.

The court below expressed disagreement with the District of Columbia Circuit's decision on the public-need question (Austral Pet. App. A, pp. 26a–27a) on the assumption that that decision requires a burdensome evidentiary presentation on the need issue in every producer certificate case. Thus, the court below referred (*ibid.*) to a "proliferation of issues and evidence in § 7 [producer] proceedings" that, in its view, would necessarily result if the Commission should attempt to follow the decision of the District of Columbia Circuit. As we explained in our memorandum in No. 231, we do not believe that the District of Columbia Circuit's opinion can properly be read as imposing such rigid evidentiary or hearing requirements. In our view, it requires only a more detailed explanation of the result reached by the Commission in that case. Since the requirements imposed by the District of Columbia Circuit's decision—although in our opinion stemming from an erroneous view of the law—would not impose any significant

administrative burden on the Commission or affect the substantive rights of any party, there would appear to be no occasion for further review of that decision.

CONCLUSION

The petitions for writs of certiorari should be held to abide this Court's final disposition of the petitions in Nos. 60–62, 80, 97 and 503.

Respectfully submitted.

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